HOCK HUA BANK BHD.

v.

WORLD WIDE AGENCIES (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL APPEAL NO. 33 OF 1976]
14 FEBRUARY 1984

CONTRACT: *Guarantee - Whether defendant liable - Whether defendant guarantor.*

EVIDENCE: *Guarantee document - Whether could be tendered as exhibit - Whether maker of document needed to be called - Applicability of ss. 61, 62, 73A, Evidence Act.*

All the defendants, except the first defendant were sued as guarantors. Judgment in default of appearance was entered against the first, second and sixth defendants, and consent judgment against the fourth and fifth defendants. The hearing of the case was therefore between the plaintiffs and the third defendant only. The defendant objected to the tender of the guarantee document as an exhibit, otherwise than by the maker of the document.

Held:

[1] The guarantee document could not be tendered as an exhibit. Section 73A of the Evidence Act applied. The application of ss. 61 and 62 was therefore excluded. The maker of the document ought to have been called. The proviso to s. 73A(1) did not apply.

[2] However, there was sufficient evidence to hold the defendant liable as a guarantor.

[Judgment for plaintiffs.]

Case referred to:
Mahesh & Ors. v. Nura [1929] AIR Lah 82

Legislation referred to:
Evidence Act 1950, ss. 61, 62, 73A, (1)

For the plaintiffs - Chong Yee Keong; M/s. Yeo & yeo
For the 3rd defendant - Ong Chin Beng; M/s. Ong Chin Beng & Rakan-Rakan

JUDGMENT

Zakaria Yatim J:

In this case the plaintiffs, who are bankers, sued all the six defendants for a sum of RM70,134.82, which the plaintiffs claimed, was owed by the defendants. The second, third, fourth, fifth and sixth defendants were sued as guarantors. According to the statement of claim it was the guarantors who requested that an account be opened and a loan and banking facilities be given to the first defendant and, in consideration, they agreed to guarantee and indemnify the plaintiffs in respect of all principal sums and interest due and owing, demands, costs, charges and expenses of the plaintiffs thereby incurred.

Judgment in default of appearance was entered against the first, second and sixth defendants on 25 March 1976. With regard to the fourth defendant, a consent judgment was entered against him on 9 June 1978 for a sum of RM18,000 with interests and costs. A consent judgment was also entered against the fifth defendant on 13 February 1984 in terms of the prayers contained in the statement of claim.

The only remaining defendant in this case is the third defendant. The hearing of this case was therefore between the plaintiffs and the third defendant.

The principal issue before me was whether the third defendant was one of those who guaranteed the loan and facilities given by the bank to the first defendant. A document which was identified by PW1 as the guarantee document was produced in Court for identification but it was not tendered as an exhibit. Counsel for the plaintiffs indeed wanted to tender it as an exhibit. This was objected to by Counsel for the third defendant on the ground that the maker of the document had to be called to produce it as evidence. His objection was based on s. 73A of the Evidence Act. According to him, under this section, the guarantee document could only be produced in Court by the maker of that document. Counsel for the plaintiffs contended that the document was the original document and, therefore, it should be accepted as an exhibit. He further argued that the guarantee document was identified by PW1 and admissible under ss. 61 and 62 of the Evidence Act. In support of his argument he relied on an Indian case, *Mahesh & Ors. v. Nura* [1929] AIR Lah 82. In this case the Indian Court held that where a document had been properly proved and discussed in the High Court, it was admissible for evidence though not marked as an exhibit. Counsel for the third defendant, however, argued that ss. 61 and 62 of the Evidence Act did not apply in this case since he was relying on s. 73A of the Evidence Act. There is no equivalent of s. 73A in the Indian Evidence Act. Section 73A sub-section (I) reads as follows:

> Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
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> (a) if the maker of the statement either-
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> (i) had personal knowledge of the matters dealt with by the statement; or
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> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
>
> (b) if the maker of the statement is called as a witness in the proceedings;
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> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find have been made without success.

A careful reading of s. 73A clearly shows that the section excludes the application of ss. 61 and 62 and therefore, the Indian case cited by Counsel for the plaintiffs is not applicable here.

The plaintiffs failed to call the makers of the document as their witnesses. They have also not adduced any evidence to show that the makers of the document were dead, or unfit to attend Court or overseas or not traced. There is also no evidence that the plaintiffs were relying on the other provisions of the section.

Since the guarantee document was not tendered as an exhibit, the Court had therefore, to rely on the oral evidence of PW1. The material part of the evidence of PW1 was as follows:

PW1 said the guarantee covered both overdraft facilities as well as trust receipts. He read Clause 1 of the guarantee document and he said it covered all forms of facilities advanced by the plaintiffs to the defendants. He also said that under Clause 4, the guarantee was a continuing guarantee. The witness testified that the third defendant signed the guarantee document in April 1975. The total amount of guarantee as requested for was RM100,000. At the time of the signing of the guarantee, the first defendant was already indebted to the plaintiffs. After sometime when the debt was not paid, the bank issued a letter of demand demanding the first defendant to pay the debt. A reply to that letter was given by the third defendant in a letter signed by him. But the debt was still not paid by the defendant.

Apart from the evidence of PW1 the pleadings also indicated that there was such a guarantee executed by the third defendant. In his statement of defence, the third defendant did not deny that there was a guarantee. Indeed it was explicit in his defence that he acknowledged that there was such a guarantee. In para. 7 of his statement of defence he acknowledged receiving the guarantee letter on 18 March 1976 through his solicitors. The rest of his defence referred to the guarantee letter but he disclaimed any liability under the guarantee. At the end of the case for the plaintiffs, the defendant elected to submit no case to answer.

After considering the whole of the evidence of PW1 and the pleadings as well as the submissions of both Counsel, I found that the plaintiffs had established their case against the third defendant. I accepted the evidence of PW1. He had full knowledge of the loan and guarantee transactions. In my opinion, he was a truthful witness. Since the third defendant did not adduce any evidence of rebuttal, the balance of probability remained in favour of the plaintiffs. I accordingly gave judgment for the plaintiffs against the third defendant in terms of the prayers stated in the statement of claim.

Also found at [1984] 2 CLJ 41